

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	No. 63334-1-I
)	
Respondent,)	
)	UNPUBLISHED OPINION
v.)	
)	
MICHAEL THRASHER,)	
)	
Appellant.)	
<hr/>		FILED: <u>June 7, 2010</u>

SCHINDLER, J. — Michael Thrasher appeals his conviction for failure to register as a sex offender claiming the prosecutor violated his constitutional rights by commenting on the exercise of his right to remain silent and right to counsel. Thrasher also claims his attorney provided ineffective assistance of counsel by not proposing a jury instruction on necessity. Because Thrasher fails to demonstrate a manifest error affecting a constitutional right or that his attorney’s performance was deficient, we affirm.¹

¹ On April 30, Thrasher filed a letter stating that he had “fired” his appellate counsel. Without requesting any particular action or relief from this court, Thrasher complains that appellate counsel failed to include certain documents in the record and states that he did not approve of counsel’s legal work. Nothing in Thrasher’s letter suggests a knowing, intelligent, and voluntary waiver of his right to counsel on appeal or an unequivocal request to proceed pro se. See, State v. Rafay, 167 Wn.2d 644, 652-53, 222 P.3d 86 (2010). Even if we were to construe his letter as such, given the circumstances here, where counsel has filed briefs, Thrasher has filed his Statement of Additional Grounds for Review, and this court, by letter sent on April 22, notified Thrasher of the hearing date of the case scheduled for hearing without oral argument, it is untimely. Rafay, 167 Wn.2d at 654.

FACTS

Sometime prior to 2008, Michael Thrasher was convicted of a sex offense. Under Washington law, a sex offender is required to register with the sheriff of the county and provide a complete residential address. RCW 9A.44.130(3)(a). A sex offender who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. RCW 9A.44.130(6)(b).

In May 2008, Seattle Police Detective Samuel Vrandenburg's duties included verifying address of registered sex offenders in the City of Seattle. Sometime before May 15, Vrandenburg received a change of address form submitted by Thrasher on April 25, listing his address as 512 Third Avenue, No. 210. After walking to the area and failing to find the address, Vrandenburg called the phone number listed on Thrasher's change of address form and left a message. A person identifying himself as Thrasher called Vrandenburg about an hour later. Vrandenburg asked Thrasher to meet him at the address and Thrasher "got upset and wanted to argue." Vrandenburg "told him that I wouldn't argue. I just said I simply had to verify his address. And then [sic] I suspected it was a bogus address and he said well you can talk to my attorney about this because I don't have to talk to you." According to Vrandenburg, Thrasher told him "to call his attorney," and "gave [Vrandenburg] the attorney's name and phone number."

On May 19, Vrandenburg received another change of address form submitted by Thrasher on May 15, listing an address of 1213 Third Avenue, No. 210. When Vrandenburg walked to the listed address, he found a bank building without any residences. Vrandenburg called Thrasher again to “reason with him . . . to get him into compliance.” In response, Thrasher “wanted to argue more,” “was belligerent,” said that “he wasn’t living anywhere right now,” “used some explicatives,” and said “not to call him back, I had to talk to his attorney.” Thrasher did not report that any medical problem or obstacle was preventing him from registering and did not give any indication of where he was staying.

The State charged Thrasher with felony failure to register as a sex offender between April 14 and July 14, 2008, by providing a false address on April 25, 2008 and May 15, 2008, and by failing to report weekly, in person, to the sheriff’s office while lacking a fixed residence.

Prior to trial, Thrasher moved to exclude any testimony from Detective Vrandenburg about the telephone conversations. He argued that the caller’s statement of Thrasher’s name alone was not sufficient to identify the caller as Thrasher because Detective Vrandenburg had never met Thrasher or heard his voice before. The trial court determined the circumstances surrounding the calls and the caller’s knowledge of particular details were sufficient to establish the caller’s identity and denied the motion to suppress.

Detective Vrandenburg, King County Sheriff’s Office Custodian of

Records Dallas Arner, and Thrasher testified at trial. The parties stipulated that Thrasher had been previously convicted of a felony sex offense requiring him to register as a sex offender during the period of time between April 14, 2008 and July 14, 2008.

Arner testified that Thrasher signed a notification acknowledging the registration requirements in November 2002. Arner explained that Thrasher had to file change of address forms when he moved or report in person to the sheriff's office once every week if he did not have a permanent address. Arner identified the change of address forms submitted by Thrasher and testified about the number of weeks that Thrasher was registered as homeless but failed to report to the sheriff's office.

Thrasher testified that in April 2008 he was homeless and staying with a friend in Kent. Thrasher testified that he does not work but collects social security disability benefits, does not have a car, wears a leg brace, uses a cane to walk, suffers from epilepsy and hepatitis, and that he sought medical attention at the emergency room of Valley Medical Center at various times in 2008. Thrasher said that he was too sick to make the three hour trip to the sheriff's office every week while he was staying with his friend in Kent. Thrasher also testified that he listed Harborview Hospital as an additional contact site on one of his sex offender registration forms because he was scheduled for treatment at Harborview.

On cross examination, Thrasher admitted that he listed the address of The Family and Adult Services homeless shelter on his April 25 and May 15 change of address forms, even though he was not staying at the shelter. Thrasher said he listed the shelter because he was homeless and received some services there. He also admitted that (1) he filed change of address forms in person on April 25, May 15, and June 16, (2) he never reported the Kent address where he was staying, and (3) after registering as homeless on June 16 and signing the acknowledgement that he was required to register in person weekly, he did not do so. Thrasher also testified that he did not know that it was Detective Vrandenburg's job to verify his address, that he told Detective Vrandenburg that he would have "no further conversations with him and he could contact my lawyer." Thrasher said that he did not tell Detective Vrandenburg about his medical issues because "[i]t's really none of his business."

The jury found Thrasher guilty as charged. Thrasher appeals.

DECISION

Manifest Constitutional Error

Thrasher first contends that the prosecutor violated his constitutional rights by eliciting testimony and commenting on his exercise of the right to remain silent and his right to counsel. If there is no objection at trial, reversal is required on such grounds only if there has been a manifest error affecting a constitutional right. RAP 2.5(a); State v. Gregory, 158 Wn.2d 759, 839, 147

No. 63334-1-I/6

P.3d 1201 (2006).

Thrasher did not object at trial to the Detective's testimony or the prosecutor's comments that he now identifies in his appeal as an improper violation of his constitutional rights. "An objection which does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review." State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

Although defense counsel objected the first time Detective Vrandenburg testified that Thrasher told the Detective to call his attorney, he did not state the basis of the objection, obtain a ruling, from the trial court or request a curative instruction. Thereafter, defense counsel made no objection to the Detective's testimony regarding his telephone conversations with Thrasher including Thrasher's statements to the Detective about his attorney. Moreover, Thrasher testified that he refused to speak to the Detective and referred the Detective to his attorney. Under these circumstances, the initial objection on unspecified grounds was not sufficient to preserve the issue for review and Thrasher must demonstrate a manifest error affecting a constitutional right.

To establish manifest error, Thrasher has the burden of showing that the alleged constitutional error resulted in actual prejudice. It is "this showing of *actual prejudice* that makes the error "manifest", allowing appellate review." Gregory, 158 Wn.2d at 839 (quoting State v. McFarland, 127 Wn.2d 322, 333,

899 P.2d 1251 (1995)). To demonstrate actual prejudice, Thrasher must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). In determining whether a claimed error is manifest, we must view the error in the context of the record as a whole, rather than in isolation. State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988).

The State argues that Thrasher fails to demonstrate error, let alone manifest error, because the prosecutor was justified in making some limited inquiry about Thrasher's statements to Detective Vrandenburg based on the defense argument regarding identity of the caller. See e.g., State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991) (claim of improper comment on right to remain silent turns on whether the prosecutor "manifestly intended the remarks to be a comment on that right.")

The State also argues that the prosecutor was justified in referring to Thrasher's statements to Detective Vrandenburg in closing and in the rebuttal in response to the defense claim that Thrasher did not knowingly violate the law by arguing that Thrasher never told Detective Vrandenburg about any of the medical problems that he later claimed prevented him from registering a proper address or reporting weekly if he was homeless.

In an attempt to establish practical and identifiable consequences, Thrasher claims that his credibility was severely undermined by Detective

Vrandenburg's testimony that Thrasher was "belligerent," and that Thrasher refused to talk to him and referred him to his attorney. Thrasher also claims that the prosecutor's argument in closing that such behavior indicated Thrasher knew he was guilty of violating the registration law undermined his credibility.

Thrasher argues that a rational jury may have reached a different verdict absent the improper testimony and argument based on his testimony about his medical problems. We disagree.

Thrasher only disputed Detective Vrandenburg's characterization of him as "belligerent." Thrasher did not dispute any of the statements Detective Vrandenburg attributed to him about his attorney or his reluctance to speak to the Detective. In fact, his statements were consistent with the defense theory of the case.

The defense theory was that Thrasher did not "knowingly" violate the law because he attempted to comply with the law as best he could while he was homeless and suffering from debilitating medical problems. Thrasher testified that during the time that he did not have a permanent address, he attempted to include information on each form to allow law enforcement personnel to contact him, including his phone number, Harborview hospital where he was receiving treatment, and the homeless shelter where he sometimes received mail. Thrasher also explained that he attempted to fill out the forms correctly.

Thrasher admitted that he filed three change of address forms in person

at the sheriff's office during the charging period, but explained that his debilitating medical problems prevented him from making additional trips. Thrasher said that he did not know that it was Detective Vrandenburg's job to verify his address. Thrasher admitted that he told the Detective to call his attorney and that he did not want to discuss his medical problems with the Detective.

During closing argument, defense counsel stressed that Thrasher's actions did not indicate a desire to avoid being found, but demonstrated that he was doing the best that he could in his desperate circumstances and was justifiably annoyed and upset when the Detective seemed to needlessly demand more. Because the testimony and argument about which Thrasher now complains did not actually undermine his credibility as he claims, Thrasher fails to demonstrate practical and identifiable consequences in the trial and his claim of error is therefore not manifest.²

Ineffective Assistance of Counsel

Thrasher next argues that he received ineffective assistance of counsel

² Even if Thrasher were able to demonstrate a manifest constitutional error, the error was harmless. See State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992) (where constitutional error is raised for the first time on appeal, after determining that a manifest constitutional error was committed, the reviewing court conducts a harmless error analysis). Thrasher admitted that he knew of his obligation to register, he filed two forms listing addresses at which he did not reside, he did not register the address in Kent at which he was residing, and after registering as homeless he did not report weekly. Thus, Thrasher admitted every element of the crime except for knowledge. Because the references to his prearrest silence and his attorney do not implicate knowledge, any error was harmless beyond a reasonable doubt.

No. 63334-1-I/10

because his attorney did not propose a necessity instruction based on his medical problems.

To establish ineffective assistance of counsel, Thrasher must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness based on a consideration of all the circumstances. State v. Stenson, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997). There is a strong presumption of effective representation, and Thrasher bears the burden of demonstrating there was no legitimate strategic or tactical rationale for the challenged conduct. McFarland, 127 Wn.2d at 334-35. To prove prejudice, Thrasher must show that but for counsel's deficient performance, there is a reasonable probability the outcome of the proceedings would have been different. State v. McFarland, 127 Wn.2d at 335. If Thrasher fails to satisfy either part of the test, we need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To establish that his attorney's failure to propose a particular instruction constitutes ineffective assistance, Thrasher must show that he was entitled to the instruction. State v. Johnson, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007).

A necessity defense is available

“when the physical forces of nature or the pressure of circumstances cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting from violation a of the law. The defense is not applicable where the

compelling circumstances have been brought about by the accused or where a legal alternative is available to the accused.”

State v. Gallegos, 73 Wn. App. 644, 650, 871 P.2d 621 (1994) (quoting State v. Diana, 24 Wn. App. 908, 913-14, 604 P.2d 1312 (1979)).

Thrasher contends that he reasonably believed that he was too sick to travel to downtown Seattle to register in person and that the harm to his health of a long walk and bus trip was greater than the harm of not personally appearing to register as homeless. He also contends he had no reasonable alternative because he could not telephone the sheriff’s office and had no permanent address. Contrary to Thrasher’s claims, there was no evidence presented at trial to suggest that Thrasher was somehow prevented from registering by mail with the Kent address where he testified that he was staying with his friend at least from April 25 through July 14, 2008. Because Thrasher had an available legal alternative he was not entitled to a necessity instruction.

Moreover, based on Thrasher’s testimony at trial concerning his poverty, his medical problems, and his attempt to comply with the law, trial counsel made a reasonable tactical decision to argue Thrasher’s medical problems created a reasonable doubt as to knowledge rather than trying to argue a necessity defense that was not supported by the evidence. Because we conclude that Thrasher’s attorney was not deficient for failing to propose a necessity instruction, his ineffective assistance of counsel claim fails.

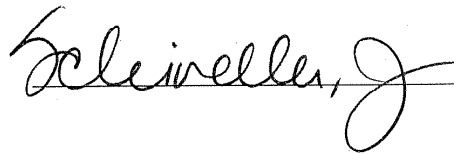
Cumulative Error

Thrasher also claims that cumulative error denied him a fair trial. The cumulative error doctrine applies if there are “several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Because Thrasher has not established a manifest error affecting a constitutional right nor deficient performance by his attorney, the cumulative error doctrine does not apply.

Statement of Additional Grounds for Review

In his Statement of Additional Grounds for Review, Thrasher claims that the “courts have lost jurisdiction on this case” and have no “authority to enforce any obligation on the original cause.” He also claims that the original case was closed and the maximum time has expired. Because these claims are not supported by evidence in the record, we cannot review them. See RAP 10.10(c).³

Affirmed.

A handwritten signature in black ink, appearing to read "Schneider, J.", with a stylized flourish at the end.

³ To the extent material facts exist as to the validity of the original charge leading to his obligation to register as a sex offender, Thrasher's recourse is to bring a properly supported personal restraint petition. See RAP 16.4; State v. Alvarado, 164 Wn.2d 556, 192 P.3d 345 (2008).

No. 63334-1-I/13

WE CONCUR:

Edington, J.

Becker, J.